United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

76-1435

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 76-1435

UNITED STATES OF AMERICA,

Appellee,

-against-

JOHN M. KING and
A. ORWLAND BOUCHER,

Appellants.

On Appeal from the United States District Court
for the Southern District of New York

PETITION FOR REHEARING

MALONEY, VIVIANI & HIGGINS
Attorneys for Appellant
A. Rowland Boucher
630 Fifth Avenue
New York, New York 10020
Tel: (212) 586-6006

Of Counsel:

Andrew J. Maloney
Norman Arnoff

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1435

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN M. KING and A. ROWLAND BOUCHER,

Appellants.

PETITION FOR REHEARING BY APPELLANT BOUCHER

This petition for rehearing is respectfully submitted on behalf of A. Rowland Boucher, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, on the ground that certain of this Court's findings and conclusion of law, as expressed in its opinion in this case dated July 22, 1977, rest upon erroneous interpretation of law and pertinent facts in the record. Reconsideration for the reasons set forth below is urged upon the Court.

Preliminary Statement

It is respectfully submitted that this Court was in error both on the law and facts in affirming Appellant

Boucher's conviction in that the Government made improper "use" of immunized testimony and that the Court erred in regarding "use" solely as investigatory leads. However, "use" also constitutes use of such testimony to prepare cross examination, which occurred in the instant case.

Opinion of the Court

In affirming the judgment of conviction entered in the Southern District of New York, this Court, inter alia, found, at p. 4893:

> "Because the prosecution already had independent sources for its full case, Boucher is wrong in claiming taint merely because the S.E.C. attorney, after the indictment in order to see what kind of witness this appellant would make, read Boucher's 1971 bankruptcy testimony (see United States v. Bianco, 534 F.2d 501, 514 n. 14 (2d Cir.), cert. denied, 429 U.S. 822 (Oct. 5, 1976)). The same is true of the Government's mere possession somewhere in its files of Boucher's 1973 bankruptcy testimony.[9]"

Further, in footnote 9, the Court stated:

> "Because we find no taint with respect to any of the evidence used by the prosecution, we need not consider the point that Boucher's 1973 testimony under Section 167 of the Bankruptcy Act, 11 U.S.C. § 567, did not grant him immunity."

Statement of Facts

On the eve of trial after substitution of counsel and a motion on this immunity issue had been raised, the Government conceded it had recently discovered Appellant Boucher's testimony in its "irrelevant" files.

Government's Pre-trial position: The chief prosecutor stated in his opposition papers that he and the co-prosecutor as well as the SEC attorney, assigned to assist in the trial of the case, had constantly discussed among themselves the position the defendants would take at time of trial, and thus he would have recalled reading such relevant material as that contained in the bankruptcy transcripts.

The SEC attorney, however, who sat at counsel table and assisted daily in the prosecution of the case, acknowledged he had read the 1973 bankruptcy testimony and that he did not believe it contained anything relevant. The pre-trial motions were denied, the trial was had, and post trial hearing was thereafter conducted on the issue of taint.

At the post trial hearing, the SEC attorney acknowledged that the 1973 testimony did contain relevant material.

Indeed, as pointed out in our earlier brief to the Court, every material subject matter covered at trial was covered in the 1973 testimony.

The SEC attorney furtner informed the Appellant for the first time that tne chief prosecutor had disptached him to Dallas, Texas to read the 1971 bankruptcy testimony of the Appellant Boucher "in order", as this court states at p. 4893 of its opinion "to see what kind of witness this Appellant would make". Early on in that 1971 bankruptcy transcript the Government was put on notice that the Appellant was not waiving any immunized benefits that would flow from a Section 167 hearing.*

ARGUMENT

THE COURT WAS IN ERROR IN REGARDING "USE" OF IMMUNIZED TESTIMONY AS THAT RESULTING SOLELY FROM THE FURNISHING OF INVESTIGATORY LEADS AND NOT PREPARATION FOR CROSS-EXAMINATION.

The case cited by the Court at p. 4894 in affirming the Appellant Boucher's conviction and adversely deciding the use immunity issue against him, United States v. Bianco, 534 F. 2d 501, n. 14 (2d Cir.), cert. denied, 425 U.S. 822 (Oct. 5, 1976), in fact support Appellant Boucher's

* It is unknown whether this was the cause of the 1973 testimony to finding its way into an "irrelevant" file in the U.S. Attorney's office. In any event the Government was clearly in violation of its departmental directives in the treatment of bankruptcy testimony. see Dept. of Justice Memo No. 744, April 8, 1971, to "All U.S. Attorneys" outlining precautionary measures in dealing with banktuptcy immunity.

contentions at p. 511, N. 14.

> ". . . The McDaniel court concluded that the prosecutor's use of the testimony could include such things as 'assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.' United States v. McDaniel, supra, 482 F. 2d at 311. . ." (emphasis added)

McDaniels on which Bianco relies makes very clear that an improper "use" of immunized testimony is to use such testimony for the preparation of cross examination. The Government prosecutor affirmed that there were numerous discussions by the prosecution team as to what position the Appellant Boucher might take at the time of trial and his prospective trial testimony.

The importance of the government's concern for a preview of Appellant's position at trial should be coupled with the admission by the SEC attorney, who was an intimate part of the prosecution and a de facto trial counsel that he read the bankruptcy transcripts. Thus the Government cannot overcome its heavy burden to establish non-use.

Further, the Government was on notice from the Appellant's opening statements to the jury that he would

be a witness on his own behalf which he was at the conclusion of this six-week trial. By being in possession of the Appellant's position on every material facet of this case vis-a-vis the 1973 bankruptcy testimony, the Government was at an extremely unfair tactical advantage to the detriment of the Appellant.

CONCLUSION

Wherefore, Appellant-Boucher respectfully asks this Court to reconsider its decision of July 22, 1977, affirming Appellant's conviction for the reasons set forth in this memorandum, and for such other and further relief as to this Court seems just and proper.

Respectfully submitted,

MALONEY, VIVIANI & HIGGINS
Attorneys for Appellant
A. Rowland Boucher
630 Fifth Avenue
New York, New York 10020
(212) 586-6006

Of Counsel:

Andrew J. Maloney
Norman Arnoff